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No. 79-1424

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, for and on behalf of its affected members,

Petitioners,

VS.

LEGAL AID SOCIETY OF ALAMEDA COUNTY, *et. al.*,

Respondents.

PETITIONERS' RESPONSE TO OPPOSITION OF RESPONDENTS AND FEDERAL PARTIES

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INTRODUCTION

Petitioners respectfully respond to the opposition of respondents and the federal parties that (1) the claims are not moot, and (2) the Court of Appeals fully adopted and affirmed the decree of the District Court which, on its face, creates impermissible quotas to remedy imbalance in the work force without proof of discrimination.

I.

THE CASE IS NOT MOOT

Respondent Legal Aid Society contends that the petition is moot because of a stipulation between respondents and the Federal Government and an order of dismissal entered there-

upon by the District Court on February 28, 1980. Petitioners agree with the Solicitor General that the case is not moot as "... it is well established that once an appeal is filed, jurisdiction passes from the District Court to the Court of Appeals and is returned only after the Appellate Court issues the mandate ... (citing cases)." [1]

The standards established by the District Court's decree and affirmed by the Ninth Circuit (*see* discussion, *infra*) are made fully applicable to OFCCP, the successor compliance agency to the Department of Agriculture.[2] The settlement agreement claimed by respondents to moot the case quite to the contrary shows the continuing interest of the Legal Aid Society to enforce the District Court's decree with the acquiescence of the Government.

II.

THE COURT OF APPEALS FULLY ADOPTED AND AFFIRMED THE DISTRICT COURT'S DECREE CREATING IMPERMISSIBLE QUOTAS

Respondents' and the Government's opposition call the Court's attention to language in the Ninth Circuit's decision and the OFCCP Regulations reciting "good faith" as the compliance standard for meeting "goals." It is petitioners' response, however, that so long as the Court of Appeals has fully adopted and affirmed the decree of the District Court, the critical inquiry in determining whether the Court should review this case must

[1] *See* Federal Parties' Opposition, pp. 11 & 12, n.6.

[2] *See* ¶ 3 of Judge Zirpoli's order of June 20, 1974, providing for continuing supervisory jurisdiction by the District Court of any affirmative action plans approved in Alameda County to which the standards of the decree here in issue must attach (Pet.App. A-73).

In *Illinois Tool Works* v. *Marshall*, 601 F.2d 943 (7th Cir. June, 1979), the Seventh Circuit affirmed a district court decision voiding de facto debarment regulations under Executive Order 11246 as not being moot in reliance on this Court's decision in *Super Tire* v. *McCorkle*, 416 U.S. 115 (1974) where the likelihood of application of the governmental policy continued.

be whether the decree requires government contractors to engage in preferential hiring in violation of Title VII of the Civil Rights Act of 1964 and the Fifth Amendment of the Constitution of the United States.

The language in the District Court's decree creating the quotas is as follows:

> "For each job group in which underutilization exists [3], the contractor *must* establish rates for hiring or promoting the minorities and women. The rates *must* be stated as a percentage of new placements in the job group and they *must remain in effect* (unless specifically modified on the basis of subsequent data) *until the underutilization is completely corrected.* The percentage rates must be the maximum rates that can be achieved through the contractor's putting forth every good faith effort including the use of available recruitment and training (facilities, and *must not be lower than the percentages set in the ultimate goals* ..." (Pet.App. A-34, n. 40(b) (iii)). [Emphasis added].

Petitioners respectfully suggest that the aforementioned portion of the decree creates an impermissible "quota" in the following manner. A contractor *must* establish hiring or promotion rates to fill job openings. The rate *must remain in*

[3] The decree requires that "the affirmative action program must specifically state that underutilization exists in [each] job group ... whenever the percentage of total minorities ... or of women in a job group is lower than the percentage of such persons available in that job group within the applicable labor area ..." Pet App. A-33, n.39 ¶ 3(iii).

Thus, the predicate for the establishment of "quotas" is not by determination of traditional prima facie tests of discrimination but rather a purely statistical disparity in the job group with the relevant population.

The Ninth Circuit approved this broad statistical standard as applied to Chioda Candy Company. Because the percentage of the Company's service workers was less than the percentage of minority persons "in the area labor force", the Company had discriminated against minorities solely because of this "underutilization" (Pet. App. A-21).

effect until underutilization is completely corrected. Thus, a contractor who has job openings in an area in which the relevant population ratio is 50% minorities or women must hire a woman or minority for every other opening. This is an impermissible preferential hiring rate which must remain in effect until the job group is in balance with the population ratio.

The only mention of "good faith effort" in this portion of the decree refers to the contractors establishing the maximum rate of hiring or promoting to correct the imbalance. If there be any doubt that this is quota hiring, it is further clarified by the requirement in the decree that the hiring or promotion rate "*must not be lower than the percentages set in the ultimate goals*".[4]

> The Ninth Circuit clearly affirms the decree when it states: "The decree violates neither the language of Revised Order No. 4 nor the 'administrative province of compliance authorities" (Pet.App. A-38, ¶ 39).

The Ninth Circuit, in its conclusion, is correct in stating that the present regulations at 41 C.F.R. § 2.14 provides that compliance is measured by good faith efforts to attain goals and not by whether they are realized (Pet. App. A-38) but is clearly in error when it states: "The decree does not alter this key tenet." Pet. App. A-39. To read the decree in this fashion blinks at the clear language that fixed rates of hire based on population ratios "must remain in effect ... until underutilization is completely corrected."

Absent any modification of the District Court's decree by the Ninth Circuit, efforts to explain away its consequences cannot be relied upon by the Government or the Respondents in their claim that preferential hiring is not required by the Court's decision.

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[4] (b)(i) An ultimate goal must be established for each job group in which underutilization exists and must be designed to completely correct the underutilization. The ultimate goal must be stated as a percentage of the total employees in the job group and must be at least equal to the percentage of minorities or women available for work in the job group in the labor market. (Pet.App. A-39).

CONCLUSION

The petition for certiorari should be granted as the questions presented are ripe for review and properly before this Court.

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